

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

PITTSBURGH-CANFIELD CORPORATION,
et al.,

Debtors.

CASE NUMBER 00-43394

WHEELING-PITTSBURGH STEEL
CORPORATION,

Plaintiff,

vs.

ADVERSARY NUMBER 05-4034

CENTRAL WEST VIRGINIA ENERGY
COMPANY,

Defendant.

M E M O R A N D U M O P I N I O N

On April 19, 2005, the Court held a hearing on two related matters: (i) Complaint for Declaratory Relief (the "Adversary Proceeding") filed by Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pittsburgh") against Central West Virginia Energy Company ("CWVEC") and the Answer of CWVEC in the Adversary Proceeding; and (ii) Motion of Wheeling-Pittsburgh for Order Authorizing the Assign-ment of a Coal Supply Agreement with CWVEC (the "Motion") and CWVEC's opposition thereto. At the request of the Court, prior to the hearing the parties had briefed their positions regarding the interpretation of the Coal Supply Agreement

between Wheeling-Pittsburgh and CWVEC, dated as of November 15, 1993 (the "Coal Supply Agreement"), as the same had been modified by a letter agreement dated as of March 30, 2002 (the "Letter Agreement") and by this Court's Order dated May 2, 2002 (Doc. # 1331) (the "May 2, 2002 Order").

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (M). This constitutes the Court's findings of fact and conclusions of law as required by Fed. R. BANKR. P. 7052.

BACKGROUND

Wheeling-Pittsburgh and CWVEC entered into the Coal Supply Agreement, which provided for a ten-year supply (through 2003) of 100% of the requirements for high volatile coal to be used at Wheeling-Pittsburgh's Follansbee, West Virginia, coke making plant (the "Coke Plant").

Wheeling-Pittsburgh and eight affiliates (the "Debtors") filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code on November 16, 2000. The Debtors' plan of reorgan-ization was confirmed by this Court by Order entered June 18, 2003, and the plan became effective on August 1, 2003.

On September 13, 2001, CWVEC filed a Motion and Memorandum of Law to Compel Wheeling-Pittsburgh to Determine Whether to Assume or Reject the Coal Supply Agreement (the "Motion to

Compel"). Wheeling-Pittsburgh opposed the Motion to Compel on the basis that, although the Coal Supply Agreement was then currently a benefit to Wheeling-Pittsburgh, it was premature to make a decision regarding assumption or rejection of the agreement. Wheeling-Pittsburgh argued that, in conjunction with its creditors, it was continuing to evaluate all options for the future direction of its business and it could not assume the obligation to make a cure payment of more than Seven Million Dollars (\$7,000,000.00) until details of a plan of reorgan-ization had been finalized and the parties could determine whether the Coal Supply Agreement would or would not benefit the estate. On December 6, 2001, this Court entered an Order overruling CWVEC's Motion to Compel.

By Letter Agreement dated March 30, 2002, Wheeling-Pittsburgh and CWVEC agreed that Wheeling-Pittsburgh would assume the Coal Supply Agreement, as amended by the terms of the Letter Agreement, subject to bankruptcy court approval. One of the modifica-tions to the Coal Supply Agreement contained in the Letter Agreement is the subject of the disputes in both the Adversary Proceeding and the Motion. This modified provision dealt with contract assignment and reads as follows:

Contract Assignment. Wheeling-Pitt may assign this Agreement to any corporation, partnership or other entity or person provided that such assignee assumes all of Wheeling-Pitts's obligations under the Agreement, as amended herein. If such assignment is made during the pendency of the current bankruptcy case, such assignment is subject to approval by the Bankruptcy Court,

and may be opposed by CWVEC if CWVEC believes that the assignee does not provide assurance of performance that is equal to, or superior to, the assurance provided by Wheeling-Pitt. If such assignment occurs when the Chapter 11 case is no longer pending, then such assignment shall be subject to approval by CWVEC's designated credit committee, which approval shall not be unreasonably withheld. Any such assignment shall be set forth in a formal letter agreement executed by CWVEC, Wheeling-Pitt, and such assignee.

Article XX of the original Coal Supply Agreement dealt with assignment, as follows:

Assignment

This Agreement shall inure to the benefit of and be binding on the parties hereto and their respective successors and assigns; but this Agreement may not be assigned by either party, except as indicated below, without the prior written consent of the other, except that either party may without the written consent of the other assign or pledge for financing purposes this Agreement or any monies due or to become due hereunder. Seller [CWVEC] may, without the consent of Customer [Wheeling-Pittsburgh], assign this Agreement (in whole or in part) to any of the wholly-owned subsidiaries of A. T. Massey Coal Company, Inc., provided that Seller and A. T. Massey Coal Company, Inc. each guarantees full performance of this Agreement by said assignee. Customer may also without the consent of Seller assign this Agreement (in whole or in part) to any of its wholly-owned subsidiaries to which it has conveyed the Plant or its operations, provided that any assignment of this Agreement shall not relieve Customer from its obligations hereunder. Customer shall not sell, lease, transfer or convey all or any substantial portion of the Plant, or license out its operation, to any person or entity unless such person or entity assumes the obligations of Customer hereunder. Any such assignment of this Agreement shall not relieve Customer from

its obligations hereunder.

In the event of any such sale, lease, transfer, conveyance or licensing to any person or entity other than a wholly-owned subsidiary of Customer, Seller shall have the right, at its option, to terminate this Agreement. During the first two (2) years of the term of this Agreement, the Customer shall, in addition to the foregoing requirements, not assign this Agreement to an unaffiliated purchaser of the coke facilities unless the Purchaser's performance hereunder is guaranteed by Customer's parent company.

Wheeling-Pittsburgh filed a Motion for an Order Approving the Assumption and Modification of a Coal Supply Agreement with CWVEC (the "Motion to Approve") on April 22, 2002. The modifications to the Coal Supply Agreement, which were used to justify the business decision to assume the agreement, were summarized in the Motion to Approve in five separate paragraphs, the last of which read: "The contract would be assignable by WPSC [Wheeling-Pittsburgh]." The Motion was unopposed and this Court entered an Order dated May 2, 2002 Approving Assumption and Modification of Coal Supply Agreement. Within the May 2, 2002 Order, the Court retained jurisdiction with respect to all matters arising from or related to the implementation of the Order.

Testimony at the April 19 hearing before the Court established that Wheeling-Pittsburgh's financial situation was very bad in the late winter and early spring 2002 and that daily meetings were held to try to manage cash flow. Testimony established that, at that time, Wheeling-Pittsburgh was trying to survive day to day.

Testimony of Michael Allen, Vice President of CWVEC, established that at the time Wheeling-Pittsburgh and CWVEC were negotiating modification to the Coal Supply Agreement, Wheeling-Pittsburgh told CWVEC that Wheeling-Pittsburgh might have to sell the Coke Plant as part of its reorganization process and, as a consequence, Wheeling-Pittsburgh would not be able to get its creditor's committee to support assumption of the Coal Supply Agreement unless the agreement was fully assignable.

As part of the assumption of the Coal Supply Agreement, as modified by the Letter Agreement, Wheeling-Pittsburgh agreed to make a cure payment to CWVEC of Seven Million Two Hundred Five Thousand Five Hundred Fifteen and 56/100 Dollars (\$7,205,515.56) in 60 equal installments of One Hundred Twenty Thousand Ninety-One and 93/100 Dollars (\$120,091.93) commencing six months after the date of the bankruptcy court's approval of the assumption and modification of the Coal Supply Agreement. Wheeling-Pittsburgh also agreed to pay Seven Hundred Twenty-Four Thousand Seven Hundred Eighty Dollars (\$724,780.00) as a "Price Adjustment Receivable," to be made in 12 equal monthly installments commencing a month after the bankruptcy court approved the assumption and modification of the Coal Supply Agreement.

On December 28, 2004, Wheeling-Pittsburgh announced that it had signed a nonbinding letter of intent to enter a joint venture with a flat rolled sheet steel producer, Severstal North

America Inc. ("Severstal"), which, if consummated, would require Severstal to contribute One Hundred Forty Million Dollars (\$140,000,000.00) over four years to rebuild the Coke Plant. Severstal would also pay Wheeling-Pittsburgh Twenty Million Dollars (\$20,000,000.00) when a joint venture deal closed. In return, after making its capital contributions, Severstal would own 50% of the joint venture and would be entitled to 50% of the coke produced at the Coke Plant. Wheeling-Pittsburgh would continue to operate the Coke Plant for the joint venture. The Coke Plant would be owned by the joint venture and the Coal Supply Agreement, as modified, would be assigned to the new joint venture entity.

Wheeling-Pittsburgh filed the Adversary Proceeding to resolve the disagreement between Wheeling-Pittsburgh and CWVEC concerning whether CWVEC retains the right to terminate the Coal Supply Agreement if the Coke Plant is transferred to a non-affiliated entity (e.g., the proposed joint venture).

The Coal Supply Agreement, as modified, is governed by West Virginia law.

Although the Debtors have a confirmed plan of reorganization, Wheeling-Pittsburgh's bankruptcy case has not closed and remains pending. Dozens of adversary proceedings seeking avoidance of preference payments are being actively prosecuted by Wheeling-Pittsburgh before this Court.

WHEELING-PITTSBURGH'S POSITION

Wheeling-Pittsburgh contends that it has the right to assign the Coal Supply Agreement, as modified, to Severstal, subject only to approval by this Court, and that CWVEC's only right with respect to such assignment is that CWVEC is permitted to object if it believes that the assignee does not provide assurance of performance that is equal to, or superior to, the assurance provided by Wheeling-Pittsburgh. Wheeling-Pittsburgh argues that, if CWVEC retains the right to terminate in the event that the Coke Plant is transferred to an unaffiliated entity, the modified provision regarding contract assignment becomes illusory. Wheeling-Pittsburgh argues that the provision in Article XX of the original Coal Supply Agreement regarding termination was merely a restriction on assignment, which was eliminated by the modification in the Letter Agreement.

At the time that Wheeling-Pittsburgh sought Court approval to modify and assume the Coal Supply Agreement, it was still considering many options with respect to its future and reorganization. Specifically, because Wheeling-Pittsburgh did not know if it would retain the Coke Plant as part of its reorganized operations, it needed the ability to assign the Coal Supply Agreement in the event that it transferred all or part of its interest in the Coke Plant to another entity. Thus, Wheeling-Pittsburgh argues that the termination provision, as a restriction

on assignment, was eliminated from the Coal Supply Agreement when it was modified and assumed.

CWVEC'S POSITION

CWVEC contends that the modification of the assignment provision set forth in the Letter Agreement does not replace Article XX of the Coal Supply Agreement but rather only modified portions of that article. As a consequence, CWVEC argues that its right to terminate upon Wheeling-Pittsburgh's sale, lease, transfer or conveyance of all or any substantial portion of the Plant to any entity other than a wholly-owned subsidiary of Wheeling-Pittsburgh survived the modification and assumption of the Coal Supply Agreement. CWVEC contends that Article XX actually contained two separate and wholly distinct provisions; the first dealt with the assignment of the Coal Supply Agreement and the second dealt with the sale of the Coke Plant. CWVEC contends that the Letter Agreement modified only the assignment provision and did not in any way affect its right to terminate the Coal Supply Agreement in the event of a sale of the Coke Plant.

ANALYSIS

Since the Coal Supply Agreement is governed by West Virginia law, CWVEC contends that the initial question for the Court to answer is whether the Coal Supply Agreement is ambiguous. CWVEC contends that in order to interpret whether any ambiguity

exists, the Court must interpret the amended agreement as a whole. This Court has done so. This Court finds that the Coal Supply Agreement, as modified, and the Letter Agreement, are not ambiguous and do not need parole evidence in order to be interpreted.

This Court finds, however, that Article XX of the original Coal Supply Agreement does not contain two wholly independent and separate provisions - one dealing with assignment and one dealing with termination in the event of a sale of the Coke Plant. Article XX required Wheeling-Pittsburgh to assign the Coal Supply Agreement to any purchaser of the Coke Plant. Article XX also contained the right for CWVEC, at its option, to terminate the Coal Supply Agreement in the event of a sale of the Coke Plant. CWVEC's counsel explained that these provisions protected CWVEC because CWVEC did not want to be bound in a long term contract to a party it might not like; thus, CWVEC wanted to be able to terminate the agreement if someone bought the Coke Plant that CWVEC did not find suitable as a contract partner. This reasoning demonstrates that the termination provision was a restriction on Wheeling-Pittsburgh's right to assign the Coal Supply Agreement - not a separate and distinct contract provision. Because the Coal Supply Agreement is a requirements contract for the Coke Plant, the obligations of CWVEC would not change in the event of a sale or transfer of the Coke Plant. As a consequence, the only logical reading of Article XX's right to terminate at the time of a sale

of the Coke Plant is as a restriction on assignment and not a wholly separate provision. Because it was a restriction on assignment, when the parties modified the contract assignment rights in the Letter Agreement, the provision regarding termination upon the sale of the Coke Plant was eliminated. The Letter Agreement provides that Wheeling-Pittsburgh can assign the Coal Supply Agreement to any entity, subject only to bankruptcy court approval or, after closing of the case, approval of CWVEC's credit committee, which could not be unreasonably withheld.

It is clear that Wheeling-Pittsburgh was in a difficult financial position at the time the Coal Supply Agreement was assumed in the spring of 2002. Wheeling-Pittsburgh specifically used the assignability of the Coal Supply Agreement as a reason for court approval of the Coal Supply Agreement's modification and assumption. Assumption of the Coal Supply Agreement, as modified, benefitted CWVEC by providing cure payments of more than Seven Million Two Hundred Thousand Dollars (\$7,200,000.00). CWVEC admitted that it knew that Wheeling-Pittsburgh's creditor's committee would not support assumption of the Coal Supply Agreement if it was not freely assignable. CWVEC was aware that assignability was one of the reasons used to justify Wheeling-Pittsburgh's business judgment to assume the modified Coal Supply Agreement. See, Motion to Approve. If CWVEC believed the termination provision (which restricts assignability) would

con-tinue to have efficacy despite the modification regarding contract assignment in the Letter Agreement, CWVEC was obligated to make its position known to the creditor's committee and the Court prior to entry of the Court's May 2, 2002 Order.

As a consequence, this Court finds that Wheeling-Pittsburgh is entitled to declaratory relief as follows:

1) Wheeling-Pittsburgh is entitled to assign its rights under the Coal Supply Agreement, as modified, to any entity, subject only to bankruptcy court approval (during the pendency of Wheeling-Pittsburgh's bankruptcy case).

2) CWVEC may oppose such assignment before this Court if it believes that the assignee does not provide assurance of performance that is equal to, or superior to, the assurance provided by Wheeling-Pittsburgh.

3) Any assignment approved by the bankruptcy court of the Coal Supply Agreement will not affect the continuing validity and enforceability of the Coal Supply Agreement and CWVEC is not entitled to terminate the Coal Supply Agreement or to renounce its obligations thereunder in the event of such assignment.

Because Wheeling-Pittsburgh has not concluded its negotiations with Severstal and does not have a definitive contract, this Court holds that it is premature to approve the assignability of the Coal Supply Agreement to Severstal. Until CWVEC can evaluate whether Severstal provides assurances that are

equal to or superior to that of Wheeling-Pittsburgh, CWVEC is not in a position to know whether it can or should oppose the Motion. Accordingly, the hearing on the Motion will be continued until Wheeling-Pittsburgh finalizes its agreement with Severstal and provides notice of the terms of such arrangement so that CWVEC can evaluate its position with respect thereto.

An appropriate order shall enter.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

PITTSBURGH-CANFIELD CORPORATION, *
et al., *
43394

CASE NUMBER 00-

Debtors.

WHEELING-PITTSBURGH STEEL
CORPORATION,

Plaintiff,

vs.
4034

ADVERSARY NUMBER 05-

CENTRAL WEST VIRGINIA ENERGY
COMPANY,

Defendant.

O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered this date, the Complaint of Wheeling-Pittsburgh for Declaratory Relief against CWVEC is granted; and the Motion of Wheeling-Pittsburgh for Order Authorizing the Assignment of a Coal Supply Agreement with CWVEC is held in abeyance. The hearing on the Motion will be continued until Wheeling-Pittsburgh finalizes its agreement with Severstal and provides notice of the terms of such arrangement (subject to the confidentiality order previously entered by this Court) so that CWVEC can evaluate its position with respect thereto. If CWVEC continues to have any such opposition, the Court will schedule a further hearing to resolve any remaining

issues.

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States Mail this _____ day of May, 2005, addressed to:

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